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**HEARING DATE: October 24, 2023**  
**HEARING TIME: 11:30 a.m. Pacific Time**  
**LOCATION: Via ZoomGov**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

In re

NB COMMONS, LLC,

Debtor.

No. 23-01053-FPC11

DEBTOR'S REPLY IN SUPPORT  
OF DEBTOR'S MOTION TO  
APPROVE POST-PETITION  
FINANCING

NB Commons, LLC (the "Debtor") submits this Reply in support of its Motion to Approve Post-Petition Financing (the "Motion" found at Docket No. 92). Capitalized terms herein have the meaning set forth in the Motion unless otherwise indicated. This reply is supported by the accompanying Declaration of Armand R. Pastine (the "Pastine Declaration").

**I. INTRODUCTION**

Predictably, Greyhawk filed the solitary response to the Motion. It is simply a continuation of its ongoing efforts to obstruct the Debtor's reorganization – even as to matters from which it would objectively benefit – to achieve its foreclosure windfall, at the expense of all other creditors.

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TO APPROVE POST-PETITION FINANCING – Page 1

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1 Greyhawk's efforts started in February 2023 with its refusal to turn over any  
2 rents so that even basic repair and maintenance functions could be performed, and then  
3 by its sweep of the \$600,000-plus in funds that had been escrowed for payment of  
4 property taxes. The Property's deferred maintenance and unpaid taxes are now a  
5 cornerstone of Greyhawk's complaints.

6 Before this Court, Greyhawk sought to block the Debtor from engaging its  
7 chosen bankruptcy counsel, and from employing an investment banker whose sole  
8 mission is to seek takeout financing to pay Greyhawk what it is owed, but without the  
9 multi-million dollar windfall. Now, Greyhawk objects to the Debtor borrowing funds  
10 that will always be subordinate to it and would not be repaid until and unless Greyhawk  
11 is paid in full, and which funds would in part be used to continue the Debtor's ongoing  
12 efforts to improve the condition of Greyhawk's collateral.

13 Greyhawk's transparent and meritless objection should be overruled.

## 14 II. REPLY

### 15 A. Limited DIP Loan

16 As is clear from the Motion, the DIP Loan is for an amount up to \$16,000,000,  
17 not a lump sum of \$16,000,000. However, given the pace at which this case is moving  
18 to confirmation, the Debtor's immediate needs are limited to \$1,000,000 and the Debtor  
19 will limit its request to this immediate requirement on the same terms as outlined in the  
20 Motion (the "Limited DIP Loan"). The Limited DIP Loan proceeds will be used for the  
21 Debtor's short-term operational needs, including Chapter 11 expenses.

22 In the future, the Debtor may, depending upon the development of the facts and  
23 circumstances of the case, ask the Court to approve an additional portion of the

1 \$16,000,000 facility, and specifically reserves the right to do so on motion and  
2 appropriate notice. However, at this time the Debtor does not anticipate the need for  
3 additional funding prior to plan confirmation.

4 **B. Specific Objections**

5 **1. Proposed Order.** Greyhawk asserts that because the Debtor failed to  
6 attach a proposed order to its Motion, it should be denied the financing it needs. This  
7 seeks a disproportionate consequence to a procedural misstep. The Motion itself details  
8 the terms of the DIP Loan and the ten-page Debtor-in-Possession Credit Agreement  
9 that would govern the transaction was attached to the Nelson Declaration.

10 A proposed order is attached to this Reply. All parties have had ample notice of  
11 the terms of the DIP Loan.<sup>1</sup>

12 **2. Inability to Obtain Unsecured Financing.** Greyhawk asserts that the  
13 Debtor has failed to carry its burden under section 364 that the Debtor is not able to  
14 obtain unsecured credit from other sources. To further this specious assertion,  
15 Greyhawk seeks to preclude the evidence provided by the Debtor in the Nelson  
16 Declaration, but provides no contrary evidence.

17 Greyhawk's sole support for its contentions is an unpublished opinion in a case  
18 not remotely akin to this one. *See In re TBH19 LLC*, 2021 WL 275490, at \*8 (C.D.  
19 Cal. Jan. 27, 2021). In its reliance on this case, Greyhawk fails to advise the Court that  
20 the district court there was addressing an appeal from a case where the debtor sought  
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22 <sup>1</sup> If the need for a proposed form of order was a genuine concern, on the basis that Greyhawk  
23 was actually considering the merits of the Motion, Greyhawk would have requested a draft order at  
some point during the three weeks that elapsed between the filing of the Motion and Greyhawk's  
objection. It never did.

1 retroactive approval for a secured loan taken without court authority after the Debtor  
2 had, twice, moved unsuccessfully for the court's approval of a post-petition loan. It  
3 would be difficult to imagine more dissimilar circumstances to the Motion. This  
4 unpublished opinion has no relevance here.

5 To provide further evidence to reinforce what reasonable parties already know,  
6 the Debtor submits the Pastine Declaration. Mr. Pastine is Senior Managing Director  
7 and Head of Capital Markets and Business Advisory at Celadon Financial Group, LLC,  
8 which the Debtor has engaged as its investment banking firm. (Mr. Pastine's sole  
9 mission in this case is to secure financing to repay Greyhawk in full. Greyhawk  
10 nevertheless objected to his engagement.) Mr. Pastine, a highly experienced real estate  
11 financier, confirms that the Debtor would have been unable to obtain credit on an  
12 unsecured basis.

13 Even without the Nelson Declaration or Pastine Declaration, the Court can  
14 acknowledge the obvious proposition that it is fanciful and commercially unreasonable  
15 to expect a proposed junior lender, in a Chapter 11 in which the senior lender is  
16 seemingly bent on causing the borrower's failure, to proceed on an unsecured basis.

17 **C. Benefit to the Estate.**

18 The Court might reasonably wonder why Greyhawk would object to subordinate  
19 funds being advanced that will in part go towards improving the condition of its  
20 collateral. The answer, of course, is that improving and enhancing the value of the  
21 Property undercuts a basis for Greyhawk's motion for relief from stay. A secured  
22 creditor is adequately protected for purposes of section 362(d)(1) if the value of its  
23 collateral is not declining. *United States Savings Association of Texas v. Timbers of*

1 *Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).  
2 The Property, which is being and will continue to be improved through the Debtor's  
3 efforts, is not declining in value.

4 Greyhawk therefore asserts, in a variety of arguments, that the DIP Loan will not  
5 benefit the estate. Many of Greyhawk's argument are no longer relevant to the Limited  
6 DIP Loan. It is nevertheless critical to continued funding of corrective activity on  
7 deferred maintenance, largely necessary because of Greyhawk's previous withholding  
8 of rents, as well as to pay the administrative expense associated with responding to the  
9 numerous objections that Greyhawk continues to file with this Court. The costs that  
10 Greyhawk's serial objections are imposing on this case and the Debtor's need to  
11 preserve the Property are undisputable. The Limited DIP Loan is necessary for the  
12 Debtor to address both issues.

13 **D. Terms of DIP Loan Less Costly Than Recent Eastern District Case.**

14 By way of comparison only, the relative reasonableness of the terms of the DIP  
15 Loan is demonstrated when viewed against terms of secured debtor in possession  
16 financing that were recently approved in another case in this district. *See In re iCap*  
17 *Enterprises, Inc.*, Case No. 23-01243-WLH11 (E.D. Wash.), *iCap* ECF No. 68, 68.1,  
18 68.2. The *iCap* loan, which is solely for funding administrative and professional fees,  
19 is secured by junior encumbrances on twelve (12) separate real properties. *Id.* at 68.1,  
20 Exh. A-1. Although the nominal interest rate of the loan is 18%, the addition of an  
21 "Exit Fee" of 5.0%, a "Facility Fee" of 5.0%, a "Repayment Premium" of 1.3%, and  
22 the obligation to pay all the lender's expenses, *see id.* at 12-13, drive the actual cost of  
23 the financing to approximately 30.0%.

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DATED this 23rd day of October, 2023.

By /s/ Thomas A Buford  
 Thomas A. Buford, WSBA #52969  
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